IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.398 of 2005
With
Civil Application No.709 of 2005

Shri Tukaram Bhaga Wani & anr. Appellants
Vs.
Abdul R. Dagadubhai Momin & ors. Respondents

Mr.J.S.Kini for appellants.

Mr.Tejas D. Deshmukh for resp.nos.1, 2, 4 to 9 & 11.

CORAM: B.H.MARLAPALLE, J.

June 6, 2007.

P.C.

1. Heard Mr.Kini, the learned counsel for the appellants - original defendant nos.10 and 11. Mr.Tejas Deshmukh, the learned counsel appears for the respondent nos.1, 2, 4 to 9 and 11.

2. This second appeal arises from the decree dated 22/9/1994 passed by the learned Jt.Civil Judge, Junior Division, Junnar in RCS No.32 of 1979 and modified by the lower Appellate Court in Civil Appeal No.894 of 1994 as per the judgment and order dated 5/4/2003. The second appeal has thus been waiting for admission for the last about four years and, therefore, the R. & P. was called so as to decide the same at the admission stage itself.

3. The plaintiffs i.e. Abdul Rehman son of Dagadubhai Momin along with his sister Sugarbi filed RCS No.32 of 1979 for a declaration that 1/10th share of their ancestral property was sold by defendant no.1-Fakir (brother) to defendant nos.10 and 11 illegally and they further sought relief of partition and separate possession. Defendant nos.2 to 9 were the brothers, sisters and mothers of the plaintiffs who supported the plaintiffs' case, whereas the defendant nos.10 and 11 opposed the suit on the count that the suit property viz. agricultural land bearing Survey No.101/10-A, Survey No.101/1-A and Survey No.101/19 was sold by registered sale deeds dated 20/5/1961 and 19/1/1965 (Exhibits 60 and 61) and the same was for payment of the family debts. The trial court, after considering the averments made by the respective parties and the oral and documentary evidence placed on record by them, held that the plaintiffs had 1/5th share together in the suit land and defendant nos.2 to 9 had 21/32 share together in the same. It further held that the defendant no.1 had sold only 1/10th share in the suit land to defendant nos.10 and 11 by the sale deeds dated 20/5/1961 and 19/1/1965 and the said defendants

had become owners of the land to the extent of the share of the defendant no.1 alone. On the issue of limitations it held that the suit was not filed in time but proceeded to observe that the belated approach of the plaintiffs would not refrain the Court from passing the decree for declaration, partition and possession. The defendants' plea that they had become owners by adverse possession was turned down by the trial Court.

4. Defendant nos.10 and 11 filed Civil Appeal No.894 of 1994 and the learned 11th Addl. District Judge, Pune modified the decree in the following words:

(a) Abdul Rehman, Dagadubhai Momin, Fakirshet Dagdubhai Momin and Mohamadbhai Dagadubhai Momin each having 2/16th share, Sugrabai Noormohamad Momin, Jubeda Bashir Momin, Chandbi Noormohamad Momin and Jaitunbi Dagdubhai Momin, each having 1/16th share. Karimbi Dagadubhai Momin and Airabi Dagadubhai Momin each having 1/16th share in the suit properties.

(b) Shares of Fakirshet Dagadubhai Momin, Amin Dagdubhai Momin, Karim Dagdubhai Momin and Airabi Dagdubhai Momin are extinguished, not enforceable for delivery of possession of suit properties from appellants to the extent of their shares.

(c) Actual division and partition of suit properties to the extent of shares of Abdul Rehman, Dagadubhai Momin, Sugrabi Momin, Khatib Dagadubhai Momin, Mohamadbhai Momin, Jubedabi Momin and Chandbi Momin will be dependent on final decree, if executable without violation of provisions of Fragmentation Act.

(d) The Respondent Nos.1 & 2 and 4 to 9 jointly or separately will have to prefer application before the competent court for preparation of final decree, so that reliefs related to actual division and distribution of suit assets to the extent of their shares besides to ascertain mesne profits can be considered and granted.

5. On the issue of limitation the lower Appellate Court held that the claim of the plaintiffs was enforceable under Article 65 of the Limitations Act, 1963 and so long as the suit was filed within a period of 12 years on attaining majority by the plaintiffs, the suit could not be held to be beyond limitations. The lower Appellate Court also proceeded to protect the interest of the defendant nos.10 and 11 to the extent of shares of Fakirshet Dagadubhai Momin, Amin Dagdubhai Momin, Karim Dagdubhai Momin and Airabi Dagadubhai Momin.

6. The plaint in RCS No.32 of 1979 shows that the suit land located in village Pimpalgaon (Narayangaon) was described as under:

Survey No.	Hissa No.	Area H. R.
101	10-A	0-70
101	18	0-13
101	19	0-54

These survey numbers had become Gat Nos.1153, 1157

and 1146 respectively. It was specifically averred in the suit that on attaining their majority, the plaintiffs had come to know about the sale of the agricultural land in favour of defendant nos.10 and 11 by defendant no.1 and, therefore, they issued a legal notice through their Advocate on 8/10/1978 and the same was replied by defendant no.10 on 19/10/1978 and by defendant no.11 on 25/10/1978. The suit came to be filed on or about 14/2/1979 and at that time the age of the 1st plaintiff was shown to be 27 years and the age of the 2nd plaintiff was shown to be 20 years.

7. As far as the issue of limitation is concerned, Article 65 of the Limitations Act is very clear. It is not the case of the defendant no.1 or defendant nos.10 and 11, the contesting defendants that the suit was filed beyond 12 years after attaining majority by the plaintiffs. It was also not disputed that when the sale transactions at exhibits 60 and 61 were registered, both the plaintiffs were minors. Plaintiff no.1, defendant nos.1 to 4 are the sons of Dagdubhai whereas plaintiff no.2 and defendant nos.5 to 7 are his daughters and defendant nos.8 and 9 were the two

wives of Dagdubhai. Dagdubhai died in the year 1960 and it was defendant no.1, the eldest son of Dagdubhai, who took over as the manager of the joint family. The sale deeds at Exhibits 60 and 61 clearly go to show that it was the defendant no.1 who sold the ancestral property i.e. the suit property to defendant nos.10 and 11 for consideration and he was admittedly not the sole owner of the suit property. Having considered the scheme of the Mohammedan Law the lower Appellate Court quantified the shares of each of the sons and daughters and wives of late Dagdubhai. It held that each male member will have 2/16th of the share and each daughter will have 1/16th of the share in the suit property, after deducting 1/8th common share of two wives and the decree passed by the trial Court came to be modified accordingly. The lower Appellate Court further held that the shares of Fakirshet Dagdubhai Momin, Amin Dagdubhai Momin, Karim Dagdubhai Momin and Airabi Dagdubhai Momin were extinguished and not enforceable for delivery of possession of suit properties from the appellants to the extent of their shares. Thus the appellants' interests have been protected to the extent of share of these four heirs of Dagdubhai i.e. Fakirshet, Amin, Karim and Airabi. Part III -

Succession and Inheritance (Chapter IX - Administration) of B.R. Verma's Commentaries on Mohammedan Law deals with the succession and inheritance as applicable to the Mohammedans. As per Section 112 if there is no administrator, the heirs of the deceased Mohammedan are the legal representatives in whom the property shall vest at the time of his death for all purposes. As per Section 114 an heir of the deceased Mohammedan may sue other co-heirs for recovery of his own share in the property or for partition of the estate or for the administration of the estate. The possession of the heir of the deceased Mohammedan is that of tenants-in-common in respect of specific shares. A claim by one heir to recover his share from other heirs is, therefore, governed not by Article 106 but by Article 65 of the Limitations Act as is well settled position in law and we may in this regard cite a decision of this Court in the case of Bai Jivi v. Bibanboo **[AIR 1929 Bombay 141]**. If one of the co-sharers is in possession of the property, his possession cannot be considered to be adverse against other co-sharers. The right of the latter will not be lost by the mere fact that one co-sharer is in exclusive possession and he will be deemed to be in

possession on behalf of the other co-heirs. Section 118 deals with devolution of property on heirs and it states that immediately on the death of a Mohommedan his property devolves on his heirs to the extent to which it is not covered by his valid will. Section 119 states that an heir may transfer his own share for satisfaction of any debt due from the deceased and a transfer by one heir of any share belonging to co-heir even for payment of debts shall not be valid. A suit for partition is not barred by limitation if it is instituted and 12 years have not elapsed since the rights came into existence. As per Section 125 the estate of a deceased Mohommedan devolves on his heir separately and the heirs are entitled to hold the property as tenants-in-common, each having a definite share in the whole property. Having regards to these principles of Mohommedan law, the view taken by the lower Appellate Court is a fact finding exercise so as to determine the shares of each of the daughters and two wives of late Dagdubhai. No fault could be found with the decree passed by the lower Appellate Court thereby modifying the decree passed by the trial Court.

8. Mr.Kini, the learned counsel for the appellants submitted that they are the bona fide purchasers for considerations and the transactions which were completed in the year 1961 and 1965 were sought to be disturbed by filing a suit for the first time in the year 1979 and both the Courts below committed an error in entertaining the claim made by the plaintiffs and supported by defendant nos.2 to 9. He further submitted that the mere fact that the defendant nos.2 to 9 were supporting the plaintiffs' case indicated that some of the defendants who were the parties along with plaintiffs had acted mala fide and, therefore, there was collusion between the plaintiffs and these defendants. The fact is, and as is clear from the contents of the sale deeds at exhibits 60 and 61, that the suit property was sold to the present appellants by the defendant no.1 alone and it was an ancestral property derived by the plaintiffs and the defendant nos.1 to 9 from late Dagdubhai, and that too on his demise in the year 1960. Undoubtedly the defendant no.1 Fakirshet who had taken over the administration of the family property on the demise of his father did not have the authority in law to dispose off the minors' property and both the Courts below have held that the said

disposal was not for the requirement of the joint family. This fact finding exercise done by the Courts below does not raise any substantial question of law in this second appeal and, therefore, it must fail at the threshold.

9. Appeal is hereby dismissed in limine.

10. Civil application does not survive and the same stands disposed.

(B.H.MARL